UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

DURA ART STONE, INC.
Employer

and

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)
Petitioner

and Case 31-RC-8177

AMALGAMATED INDUSTRIAL WORKERS UNION, NFIU, AFL-CIO[1]/
Intervener No. 1

and

HOD CARRIERS AND LABORERS LOCAL 783, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO
Intervener No. 2

DECISION AND DIRECTION OF ELECTION

The United Electrical Radio & Machine Workers of America ("UE" or "the Petitioner") filed a petition under Section 9(c) of the National Labor Relations Act, as amended, seeking to represent a unit of production and maintenance employees employed by the Employer, Dura Art Stone. The Employer and the Amalgamated Industrial Workers Union ("AIWU" or "Intervener No.1"[2]/) assert that I should transfer this case to the Board for decision. They further assert that if I do not transfer this case to the Board

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[1]/ I note that at various places in the record, the Amalgamated Industrial Workers Union ("AIWU") is referred to as Amalgamated Industrial Workers Union, Local 61 ("AIWU Local 61"). For example, it is referred to as AIWU Local 61 in documents relating to the 10(j) proceedings. No party contends that there is any substantive difference between the AIWU or AIWU Local 61. Since the initial certification issued to the AIWU and since Intervener #1 identified itself as the AIWU in this proceeding, this Decision will refer to Intervener #1 as the AIWU, except when referring to a document that identifies that entity as AIWU Local 61.

[2]/ Hod Carriers and Laborers, Local 783, Laborers International Union of North America, AFL-CIO ("Local 783") also has intervened in this matter. Local 783 is identified in this proceeding as Intervener #2.

for decision, then I should find that an election should not be conducted in light of pending "blocking" unfair labor practice charges and that further processing of the Representation Petition is precluded by a contract bar. The Employer and the AIWU also assert that if I do conduct an election, the ballots should be impounded pending a decision by the Board in the pending unfair labor practice cases.

In order to provide a context for the arguments of the Employer and the AIWU, in Section I of this Decision, I will describe the procedural background of this case. In Section II, I will address the above-described assertions of the Employer and the AIWU. In Section III, I will set forth my findings in this matter with respect to the Hearing Officer's rulings, jurisdiction, labor organization status and the unit description. Finally, I will set forth the Direction of Election in Section IV.

I. PROCEDURAL BACKGROUND

The AIWU was certified as the exclusive collective-bargaining representative of the Employer's employees in 1990. The Petitioner filed the Representation Petition in this matter on October 28, 2002. On November 4, 2002, the Petitioner filed unfair labor practice charges against AIWU and the Employer and thereafter I issued a Consolidated Complaint.[3]/ An unfair labor practice hearing was held and on July 31, 2003, the Administrative Law Judge issued a Decision and Order, finding that the Employer and AIWU violated the Act as alleged. The Employer and AIWU have filed exceptions to the Decision of the Administrative Law Judge.[4]/ On August 13, 2003, the United States District Court for the Central District of California granted the Application for Temporary Injunction under Section 10(j) of the Act, which I filed for and on behalf of the Board. The District Court ordered, inter alia, that the Employer

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[3]/ The Consolidated Complaint in these cases (31-CA-26009 and 31-CB-11160) allege violations of Section 8(a)(1)(2)(3) and 8(b)(1)(A) and 8(b)(2).

[4]/ I take administrative notice of the filing of the unfair labor practice charges, the issuance of the Consolidated Complaint, the issuance of the Decision and Order of the Administrative Law Judge, the filing of exceptions to the Decision of the Administrative Law Judge, and the documents filed in District Court in connection with the 10(j) proceedings.

cease recognizing AIWU Local 61 unless and until it is certified by the Board and it further ordered that the Employer and AIWU Local 61 cease giving effect to a collective bargaining agreement that they had executed on October 17, 2002.

Although I initially postponed the hearing in this matter in light of the pendency of the unfair labor practice charges, on August 26, 2003, I issued an Order Resetting Hearing. The Employer and the AIWU filed a Joint Motion to Vacate the Order Resetting Hearing. On September 2, 2003, I issued an Order Denying that Joint Motion to Vacate Order Resetting Hearing.[5]/ Thereafter, the hearing in this matter was held on September 4, 2003.

II. DISCUSSION AND CONCLUSIONS WITH RESPECT TO THE ASSERTIONS OF THE EMPLOYER AND THE AIWU

A. DUE PROCESS DOES NOT REQUIRE THAT I TRANSFER THIS CASE TO THE BOARD FOR DECISION

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. At the outset, I conclude that neither the Employer, nor the AIWU, have substantiated their assertion that due process requires that I transfer this case to the Board[6]/ for decision since I was the Petitioner in the Section 10(j) proceedings filed against the Employer and AIWU Local 61.[7]/ I do not find that the fact that I am the Petitioner in the 10(j) proceedings creates a conflict of interest for me in rendering this

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[5]/ This order, which is contained in the record as Board Exhibit No. 1(i), erroneously is captioned *Order Denying Petitioner's and Intervener's Joint Motion to Vacate Order Resetting Hearing*. I hereby correct the caption of that Order to read *Order Denying Employer's and Intervener Amalgamated Industrial Workers Union's Joint Motion to Vacate Order Resetting Hearing*.

[6]/ At the hearing, the Employer and the AIWU took the position that the case should be transferred to another Regional Director for decision. However, in their post-hearing briefs they take the position that since exceptions have been filed with the Board with respect to the Decision of the Administrative Law Judge, it would be more appropriate to transfer the case to the Board.

[7]/ The Employer and AIWU also assert that the Regional Attorney and the Assistant to the Regional Director have conflicts of interest in this matter.

decision. Nor do I find that due process requires that the case be transferred to the Board.[8]/ Moreover, I note that all of my rulings are subject to review by the Board.[9]/ Therefore, I deny the request of the Employer and the AIWU that I transfer this case to the Board.

B. BOARD AUTHORITY DOES NOT REQUIRE THAT THE PETITION IN THIS MATTER BE HELD IN ABEYANCE PENDING THE BOARD'S ORDER IN RELATED UNFAIR LABOR PRACTICE CASES

I reject the assertion by the Employer and the AIWU that Board authority requires that the instant petition be held in abeyance pending the Board's order in the unfair labor practice charges. As I noted in my Order Denying the Joint Motion to Vacate Order Resetting Hearing, in the circumstances of this case, proceeding in this representational matter is an appropriate exercise of the authority granted to me by the Board to process questions concerning representation. I do not find that any Board authority cited by the Employer or the AIWU requires that I do otherwise. To the contrary, I conclude that my administrative determination to proceed with the processing of this representation petition will best effectuate the policies of the Act.

The Employer and the AIWU allege that the NLRB Case Handling Manual for Representational Proceedings provides for the blocking of the instant representation petition in light of the pending charges in the absence of a valid *Carlson* waiver[10]/; and, they allege that since there has not yet been a Board order in the unfair labor practice cases, there cannot be a valid *Carlson* waiver. I reject the argument of the Employer and the AIWU that a *Carlson* waiver would not be appropriate in this case and I adhere to my

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[8]/ I note that in the 10(j) proceeding, I am the Petitioner "*for and on behalf of the National Labor Relations Board*." Therefore, the argument that it would be inappropriate for me to render this decision, but appropriate for the Board to do so, is fallacious.

[9]/ See, *French Hospital,* 254 NLRB 711 at fn.3 (1981).

[10]/ See *Carlson Furniture Industries,* 157 NLRB 851, 853 (1966).

administrative determination[11]/ to proceed with the processing of this representation matter in light of the District Court Order removing the alleged contract bar.[12]/ The cases cited by the Employer and AIWU are distinguishable. In *Mistletoe Express*, 268 NLRB 1245 (1984), and *Town and Country*, 194 NLRB 1135 (1972), the Board denied the petitioners' requests to proceed with representation proceedings because to do so would require the resolution of the issue of whether there was a contract bar and the resolution of the contract bar issue would have required the litigation of unfair labor practice allegations in the context of the representation proceeding. In the case herein, in light of the District Court Order that the parties cease giving effect to the contract alleged to be a bar, the processing of this representation matter does not require the litigation of unfair labor allegations.

I also note that in *Mistletoe Express*, supra at 1247, the Board stated that *Carlson* waivers are appropriate when unfair labor practices have been litigated or when unusual circumstances warrant such a waiver. I conclude that the issuance by the District Court of the Temporary Injunction and Order constitutes an "unusual circumstance" rendering the *Carlson* waiver appropriate.[13]/

C. THE PROCESSING OF THIS PETITION IS NOT PRECLUDED BY A CONTRACT BAR

The AIWU asserts that since the Board has not issued an order that the 2003-2005 Collective Bargaining Agreement executed by the AIWU and the Employer is

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[11]/ See reference by the Board in *Intalco Aluminum Corp*., 174 NLRB 975 at fn. 6 (1969) to the Board's "undisputed discretion with respect to the timing of an election." As the Board noted in that case, "the question of when and under what circumstances to direct an election in the face of unresolved 8(a)(2) charges remains one for the Board to decide."

[12]/ See *Continental Can Company*, 282 NLRB 1363 (1987).

[13]/ In *Town and Country*, supra at 1136, the Board notes *Carlson* waiver cases in which the Board conducts an election, despite the pendency of charges which normally "block" the election, because a contract was removed as a bar "either because the Board had already found the violation of Section 8(a)(2) in the companion unfair labor practice case or for reasons apparent in the context of the record in the representation proceeding." In the instant case, the reason that the contract has been removed as a bar is apparent in the context of the representation case: the District Court for the Central District of California has issued a Temporary Injunction requiring that the parties cease giving effect to that contract.

unlawful, that agreement constitutes a bar to an election. I disagree with this assertion. Since the U.S. District Court for the Central District of California issued an Order on August 13, 2003, pursuant to Section 10(j) of the Act, that the Employer and AIWU Local 61 cease giving effect to the 2002 – 2005 Collective Bargaining Agreement, that agreement can not serve as a contract bar.

D. THE DETERMINATION WITH RESPECT TO WHETHER THE BALLOTS SHOULD BE IMPOUNDED WILL BE ADMINISTRATIVELY DETERMINED AT A LATER DATE.

The Employer and the AIWU assert that if I do direct an election, as I am doing, then the ballots cast in that election should be impounded until the conclusion of the proceedings on the unfair labor practice complaint. It is not necessary for me to determine at this point in time whether the ballots should be impounded. That issue will be administratively determined at a later date.

III. FINDINGS

Upon the entire record in this proceeding, I find:

A. HEARING OFFICER RULINGS: The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[14]/

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[14]/ The Employer and the AIWU assert that the Hearing Officer erred in rejecting a number of exhibits that had been offered into evidence by the Employer. The rejected exhibits include the Consolidated Complaint in the unfair labor practice proceeding and a letter from the Associate Executive Secretary of the Board extending the date for submission of exceptions in the ULP matter. Since the Board does not litigate unfair labor practices in representation proceedings (see *Mistletoe Express Service*, supra at 1247), I affirm the decision of the Hearing Officer to reject these exhibits. Similarly, I affirm the decision of the Hearing Officer to reject the 2002-2005 Collective Bargaining Agreement that was executed by the Employer and AIWU Local 61. Since the District Court has ordered that the parties to that agreement cease giving effect to the Agreement, it is not relevant to these proceedings. Although I affirm the decision of the Hearing Officer to reject the Joint Motion for Relief from Judgment and other documents relating to the 10(j) proceeding, I take administrative notice of the fact the Employer and AIWU Local 61 have filed the motion. In addition, I affirm the decision of the Hearing Officer to exclude from evidence communications between the Petitioner and the Counsel for the General Counsel relating to the Petitioner's request to proceed in this matter. Since these documents relate to the administrative determination as to whether to proceed in this matter, I affirm the decision to exclude them from evidence.

B. **JURISDICTION**: The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.[15]/

C. **LABOR ORGANIZATIONS**: The labor organizations involved claim to represent certain employees of the Employer.

D. **QUESTION CONCERNING COMMERCE:** A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

E. **APPROPRIATE UNIT[16]/:** The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All finishing employees, welders, forklift operators, drivers, packaging, housekeeping and janitorial employees employed at the Dura Art Stone plant in Fontana, California.

EXCLUDED: Special skills employees (including mold makers) covered by other collective bargaining agreements, office clerical employees, professional employees, salespersons, guards, and supervisors as defined in the Act.

The parties agree that the unit should include the above-described employees. There are approximately 55 employees in the unit.

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[15]/ The Employer, Dura Art Stone, Inc., a California corporation with an office and place of business in Fontana, California, is engaged in the business of manufacturing architectural products in cast stone and cast gypsum. It annually purchases and receives goods and services valued in excess of $50,000 directly from points located outside the State of California. Thus, the Employer satisfies the statutory jurisdictional requirement as well as the Board's discretionary standard for asserting jurisdiction herein. *Siemons Mailing Service*, 122 NLRB 81 (l958)

[16]/ The parties stipulated to the appropriateness of the bargaining unit and stipulated that the unit description does not change the scope or the composition of the unit described in the Administrative Law Judge's decision in Case 31-CB-26009 and 31-CB-11160, but merely clarifies the description of that unit.

IV. DIRECTION OF ELECTION[17]/

I shall conduct an election by secret ballot among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations.

ELIGIBLE TO VOTE: Those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off, are eligible to vote. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls.

INELIGIBLE TO VOTE: Employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced are ineligible to vote.

Those eligible shall vote whether they desire to be represented for collective bargaining purposes by **AMALGAMATED INDUSTRIAL WORKERS UNION, NFIU, AFL-CIO,** by **HOD CARRIERS AND LABORERS, LOCAL 783,**

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[17]/ In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that I will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, or by **NEITHER UNION.**

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that an election eligibility list, containing the **FULL** names and addresses of all the eligible voters, must be filed by the Employer with me within 7 days of the date of the Decision and Direction of Election. The list must be of sufficiently large type to be clearly legible. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

In order to be timely filed, such list must be received in the Regional Office, 11150 West Olympic Blvd., Suite 700, Los Angeles, California 90064-1824, on or before**, October 6, 2003**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed the preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

RIGHT TO REQUEST REVIEW

A request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570, under the provision of Section 102.67 of the Board's Rules and Regulations. This request must be received by the Board in Washington by **October 14, 2003**.

DATED at Los Angeles, California this 29th day of September, 2003.

/s/ James J. McDermott
James McDermott, Regional Director
National Labor Relations Board
Region 31

347-4030-8733; 347-4030-8767;
347-6020-5033; 393-6061-3367;
393-6061-6700; 393-6081-2000;
393-6068-8000; 393-6068-8500